

Guidance on the sale of jointly owned property

(You should also read Practice Direction 9G available from the website www.gov.uk/court-of-protection)

Introduction

1. When two or more people own real property, i.e. land and houses, together they are referred to as the trustees of that property. If one or more of those trustees becomes incapable of managing their property and affairs they will not be able to sign any legally binding documents dealing with the property. If such a property is to be sold an application will need to be made for an order appointing someone to replace the incapable trustee, or trustees.
2. Section 20(3)(c) of the Mental Capacity Act 2005 restricts deputies from carrying out trustee functions. This does not mean that a person appointed as a deputy cannot also be appointed as a trustee. However, they are distinct and separate roles and require separate applications because the appointments are made under different statutes.
3. Applications for the appointment of a new trustee for real property can be divided into two main categories. Those where there is an existing and capable co-owner ('the continuing trustee'), and those where the incapable person is the only surviving trustee.
4. Where there is a continuing trustee, or trustees, an application needs to be made to the court under Section 36(9) of the Trustee Act 1925 for the court's permission for the continuing trustee to appoint a new trustee in place of the incapable person.

Where the incapable person is the only remaining trustee, an application needs to be made to the court under Section 54 of the Trustee Act 1925 for an order appointing at least two trustees in their place. (A minimum of two trustees need to be appointed in order to sell a property.) This situation most commonly arises when the property is held as tenants in common and the co-owner is deceased. It is important to note that unless the executors of the deceased's estate have been put on the title to the property they cannot legally deal with its transfer or sale as they are not trustees of the property.

How to apply

Section 36(9) applications

- COP1 Application form
- COP1D Annex D: Supporting information for applications to appoint or discharge a trustee
- COP24 Witness statement. This is to provide the court with the necessary information as set out in paragraph 5 of Practice Direction 9G
- COP12 Special undertaking by trustees. With the details of the continuing and proposed new trustees, and the property in question. The form must be signed by all parties.
- COP24 Witness statement. A certificate of fitness. This is only required when the proposed new trustee is not the deputy, proposed deputy or a solicitor. The certificate of fitness must be completed by someone who has known the proposed new trustee for at least two years and can attest to their suitability to act.

Section 54 applications

- These applications consist of the same forms listed above.
- In cases where a co-trustee is deceased the application must be supported by a copy of the will and grant of representation to the estate of the deceased.
- If the joint tenancy of the property has been severed a copy of the notice of severance must also be filed.

Supporting documents

- If the land is registered the application must be supported by an official copy of the entries at HM Land Registry. If the land is not registered a copy of the conveyance or other trust instrument showing who has legal title must be filed.
- Where a trustee has made an enduring, or lasting power of attorney a copy should be filed.

Attorneys appointed under Enduring and Lasting Powers of Attorney

In cases where an attorney is acting under a registered power of attorney they have acquired trustee functions in respect of trusts of land under the Trustee Delegation Act 1999. This means that an attorney can exercise the Donor's trustee powers provided that

- I. the donor has a beneficial interest in the trust property at the time that the function is exercised
- II. there is no indication that the donor did not want the attorney to exercise his/her trustee functions.

Practically this means that an attorney acting under a registered power can

- I. act with any continuing trustees in the sale of a property
- II. where the attorney is the continuing trustee, or the donor is the sole surviving trustee, appoint a new trustee to act with him/her.

Please note that if you are making an application to appoint new trustees where there is no deputy or attorney already acting for the incapacitated person, you must consider whether a further application to the court is required. For example if the incapacitated person will receive funds from the sale of the property or land then you need to consider whether somebody needs to be appointed by the court to manage these funds on their behalf.

Please note that if trustees intend to sell any land or property (in which the incapacitated person has an interest) to a friend or relative this must be disclosed to the court within the application and suitable valuations supplied from reputable local valuers.

Court Fees

An application fee is payable when you make an application. Cheques should be made payable to HM Courts & Tribunals Service (HMCTS). For applications concerning property and financial affairs, you can recover the fee from the assets of the person who lacks capacity after a deputy is appointed.

There are circumstances in which the court can waive all or part payment of the application fee depending on financial circumstances.

For further details, please see booklet COP44 - Court of Protection fees available from the website: www.gov.uk/court-of-protection

Disclaimer

Court of Protection staff cannot give legal advice. If you need legal advice, please contact a solicitor or your local Citizens Advice. Information in this guidance is believed to be correct at the time of publication; however, we do not accept any liability for any error it may contain.

If you need further help with your application, please check the website: www.gov.uk/court-of-protection

PRACTICE DIRECTION – HOW TO START PROCEEDINGS

This practice direction supplements Part 9 of the Court of Protection Rules 2007

Practice Direction G – Applications to appoint or discharge a trustee

General

1. Rule 71 enables a practice direction to make additional or different provision in relation to specified applications.

Applications to which this practice direction applies

2. This practice direction makes provision for applications:
 - (a) for the exercise of any power (including a power to consent) vested in P whether as a trustee or otherwise (section 18(1)(j) of the Act);
 - (b) under section 36(9) of the Trustee Act 1925 for leave to appoint a new trustee in place of P;
 - (c) under section 54 of the Trustee Act 1925 as to the court's jurisdiction;
 - (d) under section 20 of the Trusts of Land and Appointment of Trustees Act 1996; or
 - (e) for the court's approval of the appointment of a trustee in accordance with the terms of a trust.
3. A deputy may not be appointed to exercise any power vested in P, whether as a trustee or otherwise¹. Hence, an application must be made to the court for the court to make such a decision.

Permission to make applications to the court

4. Section 50(1) of, paragraph 20(2) to Schedule 3 to, the Act and rules 51 and 52 set out the circumstances in which permission is or is not required to make an application to the court for the exercise of any of its powers under the Act.

Information to be provided with the application form

5. In addition to the application form COP1 (and its annexes) and any information or documents required to be provided by the Rules or another practice direction, the following information must be provided (in the form of a witness statement, attaching documents as exhibits where necessary) for any application to which this practice direction applies:
 - (a) a copy of the existing trust document;
 - (b) where relevant, a copy of any original conveyance, transfer, lease, assignment, settlement trust or will trust;
 - (c) the names and addresses of any present trustees and details of any beneficial interest they have in the trust property. If the present trustees are not the original trustees, an explanation should be provided as to how they became trustees and copies of any deeds of appointment and retirement should be provided;
 - (d) the full name, address and date of birth of any person proposed to replace P as a trustee, and details of his relationship to P;
 - (e) confirmation that the trust is not under an order for administration in the Chancery Division;
 - (f) if there is only one continuing trustee, the applicant must confirm that both the trustee and the proposed new trustee have not made an enduring power of attorney or a lasting power of attorney in favour of the other party;
 - (g) if an enduring power of attorney or a lasting power of attorney has been executed by a continuing trustee, a certified copy of that document must be provided. If the power has not been registered, the applicant must confirm that the trustee is still capable of carrying out his duties as a trustee;

¹ Section 20(3) of the Act prevents a deputy being given power to exercise such powers on behalf of P.

- (h) the full name and address of any person who has an interest in any trust property as the beneficiary of a will, and whether any of them are children or persons who lack capacity;
 - (i) if the proposed new trustee is not a solicitor or a trust corporation (for example, a bank) and has not been appointed as a deputy for the trustee lacking capacity, the applicant must provide a witness statement from a person independent of the applicant, who has no interest in the trust property, attesting to the applicant's fitness to be appointed as trustee;
 - (j) if the application relates to a transfer of assets in a will trust or similar settlement into the names of new trustees, accurate details of the trust assets must be provided (including full details of any stocks and shares held);
 - (k) a copy of any notice of severance and evidence of service;
 - (l) a copy of the will and grant of probate to the deceased's estate (where relevant);
 - (m) confirmation of all relevant consents; and
 - (n) a copy of a signed trustee's special undertaking.
6. The court may direct that other material is to be filed by the applicant, and if it does, the information will be set out in the form of a witness statement.
7. If any of the information mentioned above has been provided already (e.g. by way of inclusion in an annex to the application form) it need not be provided again.

Additional information to be provided where the application relates to real property

8. In addition to the information specified in paragraph 5 above, where the application relates to real property, the information specified in paragraph 9 below must be provided. The information will be set out in the form of a witness statement.
9. The information which must be provided is:
- (a) the address of the property concerned, and whether it is freehold or leasehold;
 - (b) the title number of the property and a copy of its entry in the Land Registry (if registered land). If the land is unregistered, the applicant should inform the court accordingly; and
 - (c) if the property is leasehold the applicant should advise the court as to whether he has a licence or consent to the assignment, and provide a copy of the same (or advise if a licence or consent is not necessary and the reason why it is not needed).
10. If any of the information mentioned above has been provided already (e.g. by way of inclusion in an annex to the application form) it need not be provided again.